Office - Supreme Court, U
FILED
FEB 27 1953
HAROLD B. WILLEY, C

NO. 331 MISC.

IN THE

Supreme Court of the United States

October Term 1952

CAMILO WESTON LEYRA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MILES F. McDONALD
District Attorney
Kings County
New York

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel.

32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

INDEX

PAGE

STATEMENT 1

QUESTIONS PRESENTED 2

RECORD FACTS 3

JURISDICTION 33

ARGUMENT 35

CONCLUSION 60

THE PETITION SHOULD BE DENIED 60

APPENDIX 61

CASES CITED

Adams v. New York, 192 U. S. 585, 597, 598 57

Adamson v. California, 332 U. S. 46, 91 L. Ed. 1803.. 42, 57, 58

Ashcraft v. Tennessee, 322 U. S. 143, 153 2

Bess v. Com., 118 Ky., 858 59

Bramn v. U. S., 168 U. S. 569; 42 L. Ed. 530 43

Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682 .. 42

Cadys v. State, 198 Ga. 99 59

Canty v. Alabama, 309 U. S. 628, 84 L. Ed. 988 42

Chambers v. Florida, 309 U. S. 228, 84 L. Ed. 716 .. 42

Com. v. Brown, 66 Pa. Super., 519 59

Com. v. Reynolds, 122 Mass. 454 59

Fertig v. State, 100 Wis. 301 59

Gallegos v. Nebraska, 342 U. S. 46, 91 L. Ed. 1903.. 42, 55

Haley v. Ohio, 332 U. S. 596, 92 L. Ed. 224 ..... 5, 42

Harris v. South Carolina, 338 U. S. 68, 93 L. Ed. 1815 42

Haywood v. U. S., 268 Fed. 795 57

Heller v. U. S., 57 Fed. 2d, 627; cert. denied 286 U. S. 567 59

Henze v. State, 154 Md. 332 59

PAGE

Indian Fred v. State, 35 Arizona 48 59

Lee v. Mississippi, 332 U. S. 742, 92 L. Ed. 330 ..... 26, 37
Lisenba v. California, 314 U. S. 219, 86 L. Ed. 166 .. 39,42, 44, 55
Lomax v. Texas, 313 U. S. 544; 85 L. Ed. 1511 42
Lyons v. Oklahoma, 322 U. S. 596, 88 L. Ed. 1481 ...6, 7, 42, 44, 48, 51, 53, 55

Mackmasters v. State, 83 Miss. 1 59
McNabb v. U. S., 318 U. S. 332; 87 L. Ed. 819 ..... 43, 44
Malinski v. New York, 324 U. S. 400, 89 L. Ed. 1029 .....42, 43, 52
Miller v People, 216 Ill. 309 59

People v. Borowsky, 258 N. Y. 371 51
People v. Boyd, 67 Cal. Appeals 292 59
People v. Defore, 242 N. Y. 13 57
People v. Egnor, 175 N. Y. 419, 424 56
People v. Feldman, 299 N. Y. 153 59
People v. Sherwood, 271 N. Y. 427 56
People v. Sweetin, 325 Ill. 255 56
Pierre v. Louisiana, 306 U. S. 354, 83 L. Ed. 307 43
Powers v. U. S., 223 U. S. 303, 32 S. Ct. 281, 56 L. Ed. 448 59

Raffele v. U. S., 271 U. S. 494, 46 S. Ct. 566, 70 L. Ed. 1054 59
Rafferty v. State, 91 Tenn. 655 59
Rochin v. California, 342 U. S. 165, 96 L. Ed. 183 ... 43
Rodriguez v. State, 130 Tex. Crim. 438 59

Scherpig v. State, 112 Tex. Crim. 61 59
State v. Duffy, 57 Conn. 525 59
State v. Farrell, 223 N. C. 804 59
State v. Flynn, 35 N. H. 64 57
State v. Kimes, 152 Iowa 240 59
State v. King, 102 Kan. 155 59
State v. McPherson, 77 Or. 151 59

PAGE

State v. Newman, 127 Minn. 445 59
State v. Rogers, 56 Kan. 362 59
State v. Speyer, 207 Mo. 540 59
State v. Tellay, 100 Utah 25 59
State v. Wright, 38 N. M. 427 59
Stroble v. California, 343 U. S. 181, 96 L. Ed. 872 .. 42, 44, 51, 52, 54, 56

Turner v. Pennsylvania, 338 U. S. 62, 93 L. Ed. 1810 42

U. S. v. Carnigan, 342 U. S. 36, 96 L. Ed. 48 43
U. S. v. Heller, 57 Fed. 2nd 627; cert. denied 286 U. S. 567 59

Vaught v. U. S., 7 F. (2d) 370 (C. C. A. 9) 59
Vernon v. Alabama, 313 U. S. 547, 85 L. Ed. 1513 42

Ward v. Texas, 316 U. S. 546, 86 L. Ed. 1663 42
Warde v. U. S., 158 Fed. 2d 651 59
Watts v. Indiana, 338 U. S. 49, 93 L. Ed. 1801 ..16, 21, 42, 53
White v. Texas, 310 U. S. 530, 84 L. Ed. 1343 42

OTHER CITATIONS

Code of Criminal Procedure, Section 395 41

Judicial Code—Section 237-b as amended, 28 U. S. C. A. 344-b 33

New York State Constitution, Art. 1, Section 6 41

2 Wharton Crim. Ev., 11th Ed., Section 601 56

IN THE

Supreme Court of the United States

October Term 1952

CAMILO WESTON LEYRA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a review of the judgment of the County Court of Kings County, convicting him of the crime of murder in the first degree for the killing of his father, Camilo Weston Leyra, Sr. On appeal to the Court of Appeals, the highest court of the state, the judgment of conviction was affirmed by a divided court. Majority and dissenting opinions are reported in 304 N. Y. 468.

The trial here involved was the second trial of an indictment charging petitioner in two counts, with the murder of his father and mother. He was first convicted of murder in the first degree on both counts and was separately sentenced to death with respect to each conviction. The judg-

ments were unanimously reversed by the Court of Appeals, with an opinion reported in 303 N. Y. 353.

In addition to the judgment to which this petition is addressed, petitioner was convicted of murder in the second degree for the killing of his mother, Catharine. That judgment is now on a pending appeal in the Appellate Division of the Supreme Court, Second Judicial Department.

On November 19th, 1952, Hon. Charles Froessel, a Judge of the Court of Appeals, granted a stay of execution with respect to the judgment of conviction for murder in the first degree.

Questions Presented

Petitioner contends:

1. The court erred in affirming the conviction of petitioner based upon confessions obtained by means of mental coercion, duress, threats, intimidation and promises of immunity from prosecution for the crime charged in the indictment if petitioner confessed, in violation of the due process clause of the Fourteenth Amendment;

2. The court erred in affirming the conviction based upon petitioner's testimony read to the jury from the record upon the first trial, when petitioner did not take the witness stand during the second trial, in violation of Article V of the Constitution;

3. The subsequent confessions were so close in point of time and circumstances to the first, that they should have been ruled out, for the same reasons which vitiated the first confession and made it inadmissible;

4. Without the confessions improperly received in evidence, the state has failed to make out a case.

RECORD FACTS MATERIAL TO THE QUESTIONS PRESENTED

General Outline of Case

The case against petitioner and the issues presented by the instant petition can be put in proper prospective only by reference to the records of both trials. Necessary also, is a statement of the treatment by the Court of Appeals of the facts presented in the first record and of the errors committed on the first trial. Only thus can the curative aspects of the second trial be understood.

On Tuesday, January 10, 1950, petitioner's father and mother were found in their apartment, brutally beaten to death by multiple blows upon the head. The bodies were discovered by petitioner, his business partner, Herrschaft, and a cousin, Valdez.

Fratricide and matricide are the most horrible crimes upon the index of human evil, yet each finds a place in the records of crime. But a combination of both is, at least within the knowledge of the present writer, unknown in the history of the law. Nevertheless, suspicion soon centered upon petitioner as the unnatural killer.

There was ample reason to suspect him. The most cursory investigation soon disclosed (1) that petitioner had lied concerning the disappearance of clothing which he customarily wore but which he denied having worn on the visit of discovery of his parents' bodies; (2) that he had sought to turn the attention of the police to unknown persons in a deteriorating neighborhood as the perpetrators of the crime; (3) that although he was married and the father of three children from whom he lived apart, and despite his

straitened financial circumstances, he maintained a paramour in a separate menage; (4) that he had given a demonstrably false alibi as to his whereabouts on the morning of the murders. (He told the police that he had visited his wife in her New Jersey home on the occasion of her birthday when all of the circumstances pointed strongly to the falsity of this statement); (5) he had lied concerning the purchase of a suit of clothes and a pair of shoes, obviously in order to hide his disposition of the bloodstained apparel which he had worn at the time of the killing; (6) the story of the purchase of a raincoat on the street from a peddler in the early morning hours of Tuesday, January 10th (submitted to account for the disappearance of his usually worn overcoat) was on its face incredible; (7) the records of the telephone company proved the falsity of his alibi for the morning of Tuesday, January tenth, in that he had claimed to have spoken to telephone-book distributors upon leaving his New York City apartment at ten o'clock in the morning when, in fact, the books were left at the door because of his absence, and that of his paramour, from the apartment.

Despite these well-founded suspicions entertained by the police, petitioner was permitted his liberty during Tuesday night, Wednesday and Thursday. True, he was questioned steadily from Thursday afternoon, January 12th, and through the early hours of the following morning. It is pertinent and important to note, however, that this questioning was done entirely by one man, Captain Meenahan of the New York City police force. There were no "relays of officers, experienced investigators, and highly trained lawyers" who subjected him to inquisitorial interrogation to the point where not only he but they were exhausted (*Ash-*

craft v. *Tennessee,* 322 U. S. 143, 153; *Haley* v. *State,* 68 S. Ct. 302). Moreover, even though at this time petitioner for the first time admitted his presence in his parents' apartment on the murder morning of Tuesday, January 10th—a presence which he had before consistently denied —he was, nevertheless, permitted to attend his parents' funerals on the morning of Friday, January 13th, and thereafter was taken to the Hotel St. George for refreshment via a haircut and shave and sleep.

Petitioner was next in the company of Dr. Max Helfand, a distinguished psychiatrist, teacher of neurology and psychiatry, hosiptal director, diplomate of the American Boards of Neurology and Psychiatry and author on those topics. Doctor Helfand spoke to petitioner for a while. When he left, Captain Meenahan rejoined petitioner and received from him a full oral confession.

It was the contact between Doctor Helfand and petitioner and the confession made by the latter to the doctor, as received in evidence at the first trial under instructions ruled by the Court of Appeals to be error, which was the cause of the reversal by that Court of the first judgments of conviction.

Petitioner quotes extensively from the record of the first trial, giving examples of conversations between himself and Helfand (Petition for Writ of Certiorari, pp. 14-20). We do not argue the nature of this contact and the effect thereof upon petitioner, nor its effect in law upon the course of the first trial. Clearly, and beyond possibility of minimization, the Court of Appeals thus characterized the episode:

> "Bearing in mind the undisputed setting in which this interview was arranged and recorded, while

defendant was in custody of the police; defendant's physical and mental condition at the time, already alluded to; the psychiatrist, calling himself defendant's doctor, playing upon the latter's natural fears and hopes, pressing his hands upon defendant's head with accompanying commands, and suggesting details to an unwilling mind by persistent and unceasing questioning; informing defendant that he was not morally responsible; making deceptive offers of friendship and numerous promises, express and implied; giving assurances in a pseudo-confidential atmosphere of physician and patient; and all the attendant circumstances taken together—this interview was a subtle intrusion upon the rights of defendant and was tantamount to a form of mental coercion, which, despite the good faith of the prosecution, we may not countenance here."

The court then ruled *why* the reception of this evidence was reversible error:

"Whether the coercion, which we find implicit in defendant's statement to the doctor, extended over and into the later confessions to Meenahan, Herrschaft and the assistant district attorneys remains a question of fact for the jury, and this question was never properly submitted to them. *These confessions should have been separately considered in the light of the coercion existing at the time of defendant's statement to the psychiatrist, and only if the jury were satisfied beyond a reasonable doubt that such coercion had ceased to influence defendant could they consider the later confessions. Only thus would due process of law be accorded defendant.* (*Lyons* v. *Oklahoma, supra.*)" (Italics ours.)

In another aspect of the case, the Court also held that a promise of immunity by Doctor Helfand (conveyed in

the words "These people are going to throw the book at you unless that you can show that in a fit of temper you got so angry that you did it. Otherwise they toos (toss) premeditation in and its premeditation", and more than once repeated in other language), had been improperly submitted to the jury in that the jury had not been instructed "to consider separately the later confessions, in the light of any promise that may have been made during defendant's statement to the doctor (*Lyons* v. *Oklahoma, supra*)".

We discuss the entire question of the later confessions and the trial court's treatment thereof in subsequent portions of this brief. However, it is here pertinent to state, and important to note, that one of petitioner's major defenses, which the jury rejected, *i.e.*, that he had been hypnotized by Doctor Helfand into making the confession, was in turn rejected by the Court of Appeals in these words:

> "Since the issue of hypnotism was one of fact concerned largely with the credibility of defendant as against that of the doctor, and that issue was quite fully and impartially presented to the jury, there is no reason why we should now interfere with that finding."

This opinion, per Froessel, *J.* spoke unanimously for the entire Court. It was a direction to the People that, upon the retrial of the case, petitioner's statement to Doctor Helfand should be submitted to the jury with instructions of a fourfold kind: first, that the jury could in no event consider petitioner's confession to the doctor as evidence of guilt; second, that the jury were to consider the entire episode only in relation to the subsequent confessions to Captain Meenahan, Herrschaft and the assistant district

attorney; third, that if the jury found that any of these confessions were induced, obtained or affected by either the mental coercion or the promise of immunity, they must reject that confession as being not truly voluntary; and, fourth, that if for any of these reasons they rejected all these confessions they must acquit petitioner because, as Judge Froessel wrote:

> "The verdict rests largely upon alleged confessions of defendant."

The Second Trial

Petitioner was thereupon retried. It is now pertinent to give in greater detail the testimony submitted to the jury on that second trial.

The fact of death, by reason of fractures of the skulls and lacerations of the brains of both parents, was sufficiently established by medical testimony.

William Herrschaft, who was both an employee of the senior Leyra and petitioner's partner in a different business (located also in the father's shop), testified that on the morning of Tuesday, January 10, 1950, the father neither came to the business office nor telephoned an explanation of his absence. Likewise petitioner, who was himself employed by his father, did not appear but telephoned in explanation of his absence that he was going to New Jersey to see his wife, whose birthday it was. When, later in the day, the father still had not come to the office, Herrschaft and petitioner, accompanied by Manuel Valdez, the latter's cousin, went to the parents' Brooklyn home. Petitioner was then wearing a tan raincoat which Herr-

schaft had never before seen. He did not wear an overcoat.

The bodies were there discovered. Herrschaft did not meet petitioner again until Thursday, January 12th, at which time, *before any accusation had been made,* petitioner told Herrschaft that "he thought the police had him as No. 1 suspect". In the meanwhile, as Herrschaft told petitioner, he had been interrogated by the police about petitioner's overcoat. The latter answered that he had lost the garment on January 10th *after* the visit to his parents' home; that he had worn the overcoat to Brooklyn. Herrschaft, however, remembered that he had worn the raincoat, and not the overcoat. When they consulted Valdez and a neighbor of the parents, Mrs. Gorman, both agreed with Herrschaft. Also, they testified to such agreement.

Lee Adamski, appellant's paramour, left him in their Manhattan apartment on the morning of Tuesday, January 10th at 7 o'clock in the morning, when she went to her place of employment. They next met at 11:30 that evening. When she noted that he was wearing a raincoat which she had never before seen, she asked what had happened to his overcoat. His answer was that he must have left the overcoat on the subway and had, therefore, purchased a raincoat. She also noticed that he was wearing a new suit. She never again saw the one which he had previously been in the habit of wearing.

Police Captain John J. Meenahan testified that when he first met petitioner in the late afternoon of Tuesday, January 10th, petitioner wore a raincoat. They met again on Wednesday. Meenahan learned of petitioner's family, and also of his relations with Lee Adamski. Meenahan

questioned him concerning his overcoat and was falsely told that it was at petitioner's office. A search of the office of course failed to disclose the garment.

When the captain questioned him concerning the raincoat, petitioner's answer was a classic of desperate improvisation. In addition to his employment by his father and his business partnership with Herrschaft, he also worked as a bartender in the Greenwich Village section of New York. At about four o'clock in the morning of Tuesday, January 10th, when he had quit his work there, he purchased a raincoat from a peddler on the street. As he said: "Yes; that is the custom over there—there is always peddlers around at 4 A.M." When the captain asked him about the new suit which Miss Adamski had seen him wearing Tuesday evening, he stated that he had bought it on the previous Saturday, January 7th, at the well-known Klein's store and that he had had cuffs put on. He also told the captain that he had bought new shoes at a 42nd Street Army and Navy store. Both these statements were conclusively proved to be false.

In an endeavor to strengthen his alibi, based on his alleged New Jersey birthday visit to his wife on the morning of Tuesday, January 10th, petitioner claimed to have been in his New York apartment until at least ten o'clock in the morning, at which time he answered a doorbell ring and received a new telephone book from the company's representative. This, too, was shown to have been false (by testimony of Hassett that because there was no response to his ring, he had left the book at petitioner's apartment door).

On Wednesday, January 11th, Meenahan and petitioner again spoke until about midnight. Petitioner freely left

and did not meet the captain until the next afternoon about two o'clock.

About seven thirty that evening, January 12th, Meenahan charged petitioner with his false alibi and the lies about the purchase of the suit and shoes.

The knowledge that his prevarications were of no avail finally caused petitioner to make the beginning of an approach to the truth. For the first time, he disclosed that there had been bitter arguments between himself and his father concerning the latter's business and that the father had charged him with "putting him out of business". Later, at three o'clock in the morning, petitioner for the first time admitted his presence in the apartment which he had to this point consistently denied. We stress—we properly stress—the fact that this admission preceded by almost a whole day Doctor Helfand's contact with him and contradicted his statement to the police that he had first come to the apartment on the afternoon of Tuesday, January 10th, there to discover the killings.

Meenahan was followed on the stand by Doctor Helfand. The conditions under which his testimony was received are even more important in the consideration of the petition now before the Court than that testimony. We describe them best in the words of the trial judge:

> "The Court: In other words, none of the testimony offered by this witness will be considered by the jury on the question of the guilt or innocence of this defendant."
>
> • • • • •
>
> "The Court: The point I make is this. Let us be clear about it. If this witness testified to any incriminating statements made by this defendant, I

> want to say at the outset that the jury must not in any wise, shape, form or manner consider such statement as indicating any guilt on the part of this defendant."
>
> * * * * *
>
> "The Court: Yes; in that you are quite right. But what he says by way of incrimination is not to be considered as evidence of guilt against this defendant. That is right—that is as clear as I can make it. I will say it again and emphasize it. The testimony of this witness, if it indicates any statements made by this defendant, which tend to incriminate, must be disregarded in that respect. It is not received for that purpose."
>
> * * * * *
>
> "The Court: Is there anything you care to add by way of comment or explanation so that the record may be as clear as crystal? I think I have covered it."

These statements by the court were agreed to by petitioner's counsel:

> "Mr. Healy: I think you have covered it."

The Court then said:

> "The Court: I shall say it again in the charge when we submit the case to the jury."

As we shall hereafter demonstrate, the court did amply and clearly charge the jury to the same effect.

The colloquy to which we have just referred took place in the presence of the jury. The combination of these clarifying statements, made just prior to Doctor Helfand's testimony, with the ultimate charge, which were almost the

last words heard by the jury prior to their deliberations, leaves no doubt that the sole function of Helfand's testimony was that it should be a measuring rod for the assessment of the voluntary or involuntary nature of the subsequent confessions to Meenahan, Herrschaft and the District Attorney.

It was understood on all sides that Doctor Helfand's examination was in the nature of a *voir dire* only, and as a preliminary to the introduction of these subsequent confessions. The sole purpose in calling Helfand was *for the benefit of petitioner* and in order to enable him, upon the basis of the "mental coercion" practiced upon him by the doctor, to urge the invalidity of the subsequent confessions. In a word, Doctor Helfand was in form only a witness for the People. In reality he was a witness for the defense and appeared on the stand by prearrangement among the court, the People and the defense in obedience to the direction of the Court of Appeals which, we submit, was explicit in Judge Froessel's language:

> "Whether the coercion which we find implicit in defendant's statement to the doctor extended over and into the later confessions to Meenahan, Herrschaft and the assistant district attorneys remains a fact for determination by the jury and this question was never properly submitted to them. These confessions should have been separately considered in the light of the coercion existing at the time of defendant's statement to the psychiatrist, and only if the jury were satisfied beyond a reasonable doubt that such coercion had ceased to influence defendant could they consider the later confessions."

The course of Helfand's examination makes it impossible to doubt his function on the stand. The prosecutor did

no more than put to Helfand a few questions designed to elicit his professional background and the fact that he had met petitioner through the introduction of Captain Meenahan and by arrangement with the District Attorney of Kings County. It was under cross-examination by defense counsel that Helfand recounted his practices upon petitioner and thus gave to the jury in full detail a picture of the incident which the Court of Appeals characterized as "ceaseless pressure", "torturing of the mind" and "mental coercion". When, therefore, the jury came later to scrutinize the subsequent confessions, they were to do so within the framework of the antecedent history.

Nor was the cross-examination which they heard in any sense a prefunctory one. Scrutiny of the record will disclose that defense counsel wrung from the matter every drop of value to their client including Helfand's urgence that petitioner confess the crime; his promise to help him; his manipulation of petitioner's forehead in order "to bring back all these thoughts that are coming to your mind"; his suggestion that petitioner had committed the crimes in a fit of anger; his representation that he was petitioner's doctor; his assertion "If you don't tell us and get our help, I will wash my hands of you"; his statement "If you tell us the details and come across like a good man, then we can help you. I know that morally you were just in anger. Morally you are not to be condemned. Right?"; his promise "These people are going to throw the book at you unless that you can show that in a fit of temper you got so angry that you did it. Otherwise they toos (toss) premeditation in and its premeditation. See?"

This cross-examination was not the sole attack levied upon the later confessions. Dr. Clarence H. Bellinger,

Medical Superintendent of Brooklyn State Hospital (an institution for the care and custody of insane persons), with a long career in the practice of psychiatry and well-known in the community of Brooklyn, had sat by and heard Doctor Helfand's direct and cross-examination. He was then asked the two following questions, the first by defense counsel and the second by the trial court:

> "Q. Now, doctor, assuming that those actions of the doctor were mental coercion, can you say with reasonable certainty, doctor, that said mental coercion carried over and affected any other subsequent statements that might have been made by the defendant?"
>
> * * * * *
>
> "Q. Well, can you, as a scientific man, state that in this particular defendant's case, the mental coercion, if exercised upon the defendant, would carry over to any subsequent time? Can you state with any definite certainty whether in your opinion it did?"

Doctor Bellinger expressed the opinion that there had been such a carry-over. On cross-examination he amplified the basis for this opinion. An accurate summary of his reasoning may be found in the specification that Captain Meenahan's sitting in the chair formerly used by Doctor Helfand during his interview with petitioner constituted Meenahan a "surrogate" for the psychiatrist, and endowed Meenahan with the coercive powers which Helfand had shortly before exercised over petitioner's mind.

Doctor Bellinger's diagnosis did not go unchallenged by the People. Dr. John M. Murphy, a qualified psychiatrist, expressed a contrary opinion concerning Doctor Helfand's relations with petitioner and their effect upon the later con-

fessions to Meenahan, Herrschaft and the district attorney. He was familiar with the "surrogate" phenomenon relied upon by Doctor Bellinger but believed that it applied only where the psychiatrist so directed the patient to recognize the succeeding person as a substitute. The mere "taking over the chair" would not be sufficient "to carry over a mental coercion if there were any."

The issue—the scientifically important issue—thus raised by the conflicting views of Doctor Bellinger and Doctor Murphy was, we submit, put sharply in focus for the jury at this stage of the testimony, as later, during the defense, it was in even fuller degree pressed upon their attention. We submit that by this form of proceeding, and in this contention of evidence, the trial court gave the jury an eminently proper basis for their consideration of the "carry-over" question raised by Judge Froessel's direction which we have quoted at page 13 of this brief.

After the trial court had ruled that the voluntariness of the subsequent confessions was a question of fact for the jury, the confessions were put into evidence. Brief as are the summaries which we now set forth, they nevertheless show the truthfulness of the petitioner's confessions and, by their intimate detail of matters known only to petitioner, their freedom from suggestion by Helfand. They fit the pattern described in the concurring opinion of Mr. Justice Jackson in *Watts* v. *Indiana* (338 U. S. 49, 60):

> "We must not overlook that in these, as in some previous cases, once a confession is obtained it supplies ways of verifying its trustworthiness. In these cases before us the verification is sufficient to leave me in no doubt that the admissions of guilt were genuine and truthful. Such corroboration consists

in one case of finding a weapon where the accused had said he hid it, *and in others that conditions which could only have been known to one who was implicated correspond with his story.* It is possible, but it is rare, that a confession, if repudiated on the trial, standing alone will convict unless there is external proof of its verity." (Italics ours.)

Confession to Captain Meenahan

Meenahan testified that at the close of petitioner's conversation with Doctor Helfand, he asked the doctor to call Meenahan, saying: "He seemed to be a good egg and I would like to talk to him if I could."*

Petitioner's confession to Meenahan pictured deliberate murder. He arrived at his parents' home at about eight o'clock in the morning of Tuesday, January tenth.** He found them at breakfast. An argument between him and his father, which had begun the previous Sunday, was resumed and in it the father threatened to put him and Herrschaft out of the father's business. The mother intervened and for the first time in petitioner's life he saw the father physically push her and heard him say to her: "Something I never told you in your life—keep your god damn mouth shut."

Petitioner told the father to go out for his newspaper and that upon his return they would go together to a

---

* To clarify this, we note that Meenahan and the district attorney were both in another part of the police precinct during the entire time that Helfand was talking to petitioner and thereby heard the entire conversation. It has never been contended that Meenahan or his associates practiced the slightest physical violence upon petitioner.

** This corroborates the testimony of a witness, Caroline Parnell, who was later to testify on behalf of the People that she had seen petitioner on the corner opposite the parents' home at about that time.

savings bank to withdraw some money in order to replace a check drawn on the business amount which had been returned for insufficient funds. (We now press the point which we made before the Court of Appeals: if this arrangement had actually been made—that is, for the petitioner and his father to go to the bank—why should petitioner have suggested that the father go for a newspaper and thus make an extra trip—an effort onerous for an aged man of seventy-five years? The father could have procured his newspaper as they went to the bank. The father's absence from the house, it is clear, was suggested so that petitioner could kill his mother and then await the return of his father for a similar murderous purpose. There is no question that the father did go for his newspaper between eight and nine o'clock. That was established by the testimony of Harry Rheim, a neighborhood newsdealer.)

Upon the father's departure, petitioner noticed a hammer lying on a dish closet. When he picked it up, his mother asked: "What are you going to do with that?" He answered: *"I am going to hit him over the big skull when he comes back. * * * This is going to end for once and for all."* When his mother sought to calm him, he struck her several times on the head with the hammer. He was impelled to the murderous deed by an "instinct". *He did not want her to see him hit the father.*

In the very moment, almost, of this awful and unnatural deed, petitioner heard his father returning. He went the long way from the kitchen in the rear of the apartment to the front door and, as the father turned to close that door, struck him with the hammer. The father "turned around to sort of put up a struggle." Petitioner struck him, and

struck and struck again—a prolonged assault pregnant with premeditation which clearly stamps the killing with the mark of first-degree murder.

The murderer—uniquely a matricide and patricide—then wrapped the death weapon in a towel and left the house. As he walked along the street, he threw it into a passing truck. He went back to his love-nest in Manhattan, bathed and changed his bloodstained clothing, later giving these to a passing rag picker. Then, taking with him a box of candy as a present for his wife, he went to New Jersey. He remained there but a scant period and returned to New York shortly after noon. Later in the day, he went with Herrschaft and Valdez back to his parents' home and discovered (!) the bodies.

The Confession to Herrschaft

After petitioner had unburdened himself to Meenahan, he spoke to his business partner Herrschaft at 7:30 P.M. Friday, January thirteenth. (The petition claims that one confession was made "after another without interruption" (Petition, p. 31). There is no proof of this. Certainly the Court of Appeals made no point of it. In both its reversing and affirming opinions, the Court was concerned with the *legal* question of instruction to the jury, and not at all with the *factual* element of time intervals between the confession. The record does not disclose the length of the interval.)

Petitioner gave Herrschaft the combination to the business safe, saying: "Here is the combination of the safe. I want you to get administrative powers and operate the company." Since Herrschaft had never before had the combination, he was understandably perplexed. Petitioner

explained to the startled Herrschaft: "Well, you know what it is all about; I did it."

Herrschaft asked: "Do you mean that you killed your own mother and father" and petitioner replied: "I did." In amazement, Herrschaft asked why and petitioner answered: "Oh, I don't know; I guess I just blew my top."

Be it noted that Herrschaft, although he had been in and about the police station for several hours prior to this meeting with petitioner, was not spoken to by any one in authority. Moreover, the fact that his conversation with petitioner was being recorded was unknown to him. There is not a scintilla of proof that petitioner's confession to Herrschaft was other than completely voluntary.

This was utterly damning testimony by a witness whose prior friendly relations with petitioner could not well be questioned. It was so assayed by defense counsel, who entered upon the most rigorous kind of cross-examination which, however, in no way affected either the credibility or the force of Herrschaft's direct evidence.

In the brief before the Court of Appeals, counsel spoke of the confession to Herrschaft as only "a cryptic admission by the appellant." This has always struck us as a masterpiece of understatement.

Confession to District Attorney

More than two hours after his unsolicited confession to his friend and partner, Herrschaft, petitioner again confessed—this time to representatives of the district attorney. His confession was *in narrative form.* The assistant district attorney said: "Tell us exactly in your own words what

transpired after you got into your folks' apartment'' and from then on petitioner in detail, in his own words, depicted the story of the slayings. No one familiar with the differences between coached or suggested confessions, and true confessions, could have the least doubt that the recital came out of the reservoir of petitioner's experience and not from any one's promptings. Again we point to its conformity with the test described by Mr. Justice Jackson in *Watts* v. *Indiana, supra* (p. 16, this brief).

We summarize: He arrived at his parents' home at about 8:30 A.M. on Tuesday, January 10, 1950. At the door some pleasantries passed between him and his mother, who admitted him. In the kitchen, he found his father at breakfast. Immediately there ensued the continuance of a business argument which had occurred on the previous Friday and Sunday. In great anger, the father made ''several nasty allegations'' about petitioner and Herrschaft and the partnership between them, claiming that it existed to the detriment of his own business in which they were simultaneously employed. The mother took sides with petitioner and expressed the wish that the aged father should discontinue his business activities. For the first time in petitioner's knowledge, the father pushed the mother. Finally, the father left to buy his newspaper but not before he had conferred ''a few parting insults to myself and my mother.'' While Leyra, Sr. was absent, petitioner told his mother that upon his return ''we will settle this argument once and for all.'' She tried to calm him. There then shortly occurred the double killing which petitioner thus pictured:

> ''He then came through the outer hallway and entered the apartment. While he was entering, I picked up a hammer that was laying on the shelf

> of the dish closet between the dish compartment and the knife and fork drawer. I finally became violent at this point. This violence was the direct cause of the double tragedy."

He struck his mother with the hammer and, going into the hall to meet his returning father, struck him on the head a number of times.

Petitioner told how he left the apartment and disposed of the towel-wrapped hammer by throwing it into a passing truck. He went to his Manhattan apartment, showered and changed his bloodstained clothes which he gave to a rag picker. His next step was to go to his New Jersey home with the birthday gift of a box of candy for his wife. (It cannot escape conviction that his visit was not for the uxorious purpose of celebrating her birthday, but solely for the fabrication of an alibi.) There he remained not more than half an hour.

Under oath, two assistant district attorneys, who witnessed petitioner's demeanor while he made these confessions, testified that he was in all respects normal. One, Mr. Gitlin, described him as "calm, cool, and spoke to me in a quiet manner, and told me the entire story." *It is noteworthy that defense counsel did not cross-examine either of these witnesses.*

Further Psychiatric Testimony for the People

We have adverted to the conflict between Doctor Bellinger, on behalf of the defense, and Doctor Murphy for the People, concerning the "surrogate" theory as the basis of the "carry over" effect of Doctor Helfand's treatment of petitioner on the subsequent confessions. To dispel the

fog of mystery which this clash between psychiatric experts must have engendered for the lay jury, Doctor Helfand was called. He testified that when Captain Meenahan came to the room at the conclusion of Helfand's interview with petitioner he merely, in politeness, said: "You can take my seat, captain." This was indeed a simple factual situation out of which, like the genie from Sinbad's bottle, emerged the whole portentous "surrogate" defense.

Defense counsel sought to cross-examine Helfand but did not limit himself to the issue thus raised. He went further into the transcript of the wire recording which had been made during the Helfand-petitioner contact seeking to show that Helfand had suggested to petitioner both the substance and the details of his later confession to Meenahan, Herrschaft and the District Attorney. *Out of the hearing of the jury,* the trial court thus warned counsel:

> "The Court gives you notice, and serves notice upon you now that you are opening the door to a reading of the entire record that was had, concerning the questions put by Dr. Helfand, and the answers made by this defendant. I have studiously kept that out of the record, having in mind the decision of the Court of Appeals. You are now, by your conduct, insisting that the record be brought into evidence."

Counsel nevertheless persisted in referring to the wire recording to a point where the prosecutor felt constrained to offer, and the court to receive, the entire transcript thereof on this question of suggestion. The court received it, however, subject to all its infirmities, invalidities and illegalities, saying:

> "I am receiving this merely on the question as to whether or not whatever statements the defendant

made then, or he may have made later, were inspired by this doctor; were put into this defendant's mouth by this doctor, was put into his mental reservoir by this doctor, and I say the issue has been raised by counsel, and I think the District Attorney is within his rights in offering this evidence; and on the question of whether or not the confession was voluntary or involuntary, *I rule it was involuntary. I rule it was illegal,* but on the question as to whether or not the doctor inspired what the defendant later said is a question that has now been raised by counsel for the defense and your objection is overruled.

Mr. Healy: And another ground—

The Court: It is only for that reason I will take this evidence and no other reason, and I shall instruct the jury at length on that point during my charge, if the case is submitted to the jury."

The court's reason for permitting the reception of the wire recording transcript was again expressed in this fashion:

"Now that the question has been asked of the doctor 'Didn't you suggest this' and 'Didn't you suggest that?' don't you think the jury has a right to know what happened between the defendant and Doctor Helfand to determine what the defendant later said was out of the reservoir of his own mind? Did it come from his mental storeroom, or was it something that was placed there by a physician who concededly used, according to the decision of our highest court, mental coercion? I think that is logical. That is sense. And I think without that I would be depriving the prosecution of what belongs to them, what is their right. You cannot ask a question of that kind and plant a seed of suspicion in the minds of the jury and say, 'Oh, no, we will

> not let you see the rest of it. We will hold you to this one little question,' and then go to the jury and say, 'You see, gentlemen, of course, he made a confession later, but what happened was this: Dr. Helfand put all these details into his mind, that he was merely a puppet, merely a ventriloquist's dummy, what some doctor put in his mind. If that is not law, it is just good horse sense, good common sense, and I don't think you can shut off the District Attorney after opening the door as you did, after being twice warned."

The next step in the development of the People's case was the reading into the record of petitioner's testimony at the first trial, concerning his relations with Doctor Helfand. The substance of that testimony was that as a result of the doctor's physical manipulation of petitioner's body and mental treatment of petitioner's mind, he ultimately "drifted off so I lost consciousness. From that time on I did not remember anything until Sunday." *

The Defense

Unlike his action on the first trial, petitioner did not testify at the second trial. Instead Doctor Bellinger was recalled to amplify the "carry over" testimony which he had given on the *voir dire*. We speak respectfully of Doctor Bellinger, for he has since died. Nevertheless, he did make many statements which seem to us, and must have seemed to the jury, medically as well as factually impossible. We

---

* This part of the trial is the basis for the second point in the present petition in which it is claimed that the reading of petitioner's testimony on the former trial was a violation of his rights under Article V of the Federal Constitution. We deal with this point at page 55 *seq.* of our brief.

give as only one example his assertion that even though petitioner's answers to the questions put to him by the district attorney during the last confession were coherent, responsive and descriptive, and even though the questions themselves were not leading in nature, nevertheless, petitioner's mental condition at the time of interrogation was that of a "deep state of mental coercion" and that "he was in a merely semi-conscious condition".

These dogmatic assertions were denied completely by Doctor Murphy, who found from the voluntary and detailed nature of the confessions to Meenahan, Herrschaft and the district attorney's representatives that petitioner had free will, and was fully conscious, when he inculpated himself.*

We turn now to the trial court's charge on the subject of the confessions to Helfand and the later ones to Meenahan, Herrschaft and the district Attorney. It is impossible to show the complete fairness and propriety of that charge by summary and, therefore, insofar as it deals with these confessions, we give it in full:

> "Let us return now, Gentlemen, to a consideration of the alleged confessions said to have been made by this defendant. I charge you, Gentlemen, of the jury, that the law governing confessions is as follows:
>
> 'A confession of a defendant, whether in the course of judicial proceedings, or to a private person, can be given in evidence against him, unless made under the influence of fear produced by

---

* Certainly this passage at arms between the two pundits raised an issue of fact which the jury, under both the state and federal law, were entitled to resolve against Doctor Bellinger. (*People* v. *Leyra, supra; Lee* v. *Mississippi*, 332 U. S. 742, 92 L. Ed. 330.)

threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor. It is not sufficient to warrant his conviction without additional proof that the crime charged has been committed.'

"I shall now deal, gentlemen, with the last provision of the statute, namely, 'It is not sufficient to warrant his conviction without additional proof that the crime charged has been committed.' This simply means that it must be established by the evidence that, in addition to the confession, there was proof that the crime charged had been committed. The law does not demand that there be an eyewitness who saw the crime committed. All that the law requires is that it be established in this case that Mrs. Leyra was killed by someone and that Mr. Leyra, Sr., was killed by someone. In connection with this matter, you will consider the testimony given by those who discovered the bodies, the testimony of Dr. Ruger as to the violence that was visited upon these persons which allegedly caused their deaths.

"Now, what do we mean by the word 'confession'? A confession, gentlemen, is a voluntary statement made by a person declaring that he committed the crime. The form of the confession is immaterial. Testimony of an oral confession is competent even though it has not been reduced to writing and signed by the accused. It may consist of detailed conversations with people, it may be a formal confession. A confession is admissible although elicited in answer to questions which assume the person was guilty.

"As you have already been instructed, the burden of establishing each and every element of the crime charged, and the guilt of the defendant thereof, must be borne by the prosecution. Therefore, the

burden of establishing the voluntariness of the confession must be borne by the prosecution. The word 'voluntary' imports a condition of mind which is free and unconstrained. In other words, was the making of the confession a free exercise of will on the part of the defendant? Was it made with a full and complete knowledge of the nature and consequences of the confession, free from influences affecting the will of the defendant at the time confession was made. It is obvious that, if a confession itself is to have any testimonial value, it must be shown to have been made under conditions where there was normal exercise of all the faculties, and that the declarent fully comprehended the effect of his confession. As to whether a confession is voluntary, or involuntary, is a question of fact for the jury.

"There are several problems that arise in this case with reference to the confessions allegedly made by this defendant. Let us first consider the alleged confession made to Dr. Helfand. Does this confession meet the specifications provided by the statute which I have read? (a) Was it voluntary? (b) Was it induced by any promise of leniency?

"*I charge you, gentlemen, as a matter of law, that the so-called Helfand confession was not voluntarily made; that it was due to mental coercion practiced by the physician upon the defendant. That, in and of itself, renders it worthless as evidence of guilt. It may not be regarded by you, even in the slightest degree, as any evidence of guilt. I charge you also, as a matter of law, that this so-called Helfand confession is invalid and may not be considered by you as evidence of guilt, on the further ground that Dr. Helfand, who was then acting for the District Attorney, made a promise to the defendant in order to induce him to confess, and,* thus, did induce him to

confess by reason of such promise; the said promise being, in effect, that if he made such confession, he, the defendant, would not be prosecuted for the capital offense of murder in the first degree, but, possibly, for a lesser crime. *Therefore, it is now clear that the Helfand confession may not, under any circumstances, be considered by the jury as evidence of guilt.* The Helfand confession becomes material with regard to another problem which I shall discuss with you later.

"We shall now consider the so called Meenahan confession. First, we must determine whether the confession was made. If you find that such confession was in fact made, as claimed by the prosecution, you must then determine whether the provisions of the law governing confessions which I have already called to your attention have been violated, and, thus, rendered the confession worthless as evidence of guilt.

"As already noted, you must determine whether this confession was voluntarily made. The burden is upon the People to satisfy you beyond a reasonable doubt that it was voluntary and not made under a promise of leniency.

"In arriving at a solution of these problems, I charge you that you are bound to consider the established fact that Dr. Helfand practiced illegal coercion upon the defendant and made authorized promises of leniency to him. *The presumption is that such coercion and promise of leniency continued to affect the defendant's later confessions;* unless the prosecution has convinced you, beyond a reasonable doubt, from all the credible evidence in the case, that such coercion and promise of leniency did not extend over and affect the later confession made to

Meenahan. Unless you are so convinced, the later confession made to Meenahan must be entirely disregarded and not considered by you as evidence of guilt.

"Let us now turn our attention to the so called Herrschaft confession. Gentlemen, the same elements must be considered by the jury, to wit: Was the confession made? Was it voluntary? Did the Helfand coercion and the promises extend over and affect this confession? Did the prosecution sustain the burden of establishing, beyond a reasonable doubt, that the coercion and promises did not carry over and affect the Herrschaft confession? Is the confession true? The same principles of law, to which I have made repeated reference, apply with equal force in this instance. It is only if you find, beyond a reasonable doubt, that the confession was voluntarily made and true that you may consider it as evidence of guilt.

"With regard to the so called Assistant District Attorney's confessions, the very same rules apply in this regard. The same standards to which I referred in discussing the Meenahan and Herrschaft confessions, concerning voluntariness, apply to this confession as well. The People must, as in the other instances, prove to your satisfaction, beyond a reasonable doubt that this confession was voluntarily, made in order that it may be considered by you as evidence of guilt. You must also be satisfied, beyond a reasonable doubt, that the promise of leniency made by Dr. Helfand did not carry over and induce and influence the making of this confession to the Assistant District Attorneys.

"Each confession, gentlemen, must be considered separately. Is that clear? Each stands on its own

bottom. The jury must determine whether the particular confession under consideration has been obtained in violation of law which the Court has charged. Was the Meenahan confession legally obtained? If it was, then the jury must act upon it. If it was illegally obtained, the jury will reject it. Was the Herrschaft confession legally obtained? If it was, the jury will consider it. If it was not, it is worthless as evidence. Was the Assistant District Attorney's confession legally obtained? If it was, the jury will consider it. If it was not, it must be rejected as worthless.

"Gentlemen, if all of the confessions are rejected by the jury, the defendant must be acquitted, for the reason that the Court rules, as a matter of law, that all of the other evidence in the case offered by the prosecution, even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty.

"Gentlemen, you will recall that I permitted the District Attorney to read the Helfand confession. Although the Court has declared the same, as a matter of law, to have been obtained by illegal means, the reason for the Court's action is as follows: During the course of the cross examination of Dr. Helfand, defense counsel sought to establish that the doctor prompted the defendant; in other words, suggested to him certain details concerning the commission of the crime. It may, therefore, become material, when the jury examines the contents of the Meenahan, Herrschaft, and the Assistant District Attorney's confessions, to ascertain to what extent, if any, Dr. Helfand had prompted the defendant. *In other words, whether details that he, the defendant allegedly related in the Meenahan, Herrschaft and Assistant District Attorney's confessions were*

something that was inspired by Dr. Helfand, or, was the defendant, himself, the author of the details that he allegedly supplied in the several confessions?

"Gentlemen, I have not dealt here at any length whatever with the testimony adduced by the experts called by the respective parties, that is, Dr. Bellinger and Dr. Murphy. It is appropriate, however, to present in capsule form the contentions of the parties:

1. The defendant contends, with what force and effect, of course, it is for you to say, that the coercion and promise referred to did in fact carry over and into each of the subsequent confessions.

2. The prosecution, on the other hand, contends that the coercion and promise by Dr. Helfand did not in anywise extend over into any of the confessions made to Meenahan, then to Herrschaft, and then to the Assistant District Attorneys; that the confessions so made to these persons were entirely voluntary and not induced by any promise of leniency.

"You have heard the testimony of these experts. They have given you their conclusions; they gave you their reasons for their conclusions. Gentlemen, the law permits an expert who is skilled in a particular science not only to testify to facts, but to give his opinion upon questions of a scientific nature. This is allowed because an expert is supposed, from his experience, research and study, to have a peculiar knowledge upon the subject of the inquiry, and an expert is supposed to be more capable than a layman of drawing conclusions from facts and to base his opinion upon them.

"In determining the value of the testimony of an expert, you should consider his learning, profes-

sional standing, opportunities for study, and his experience. It is of great importance that, in appraising the testimony of an expert, due consideration be given to all of these factors and that the facts from which his conclusion is drawn should be found to be satisfactorily established, since false premises may render such an opinion valueless. The testimony of an expert serves merely as a guide to the jury in its deliberations on the facts, of which they are at all times the sole and exclusive judges. Expert testimony should not be accepted or rejected indiscriminately, but it is to be weighed and considered by the jury the same as any other evidence. After weighing and considering such evidence, the jury is at liberty to disbelieve it when it is improbable, or when it is discredited, or when the jury believes that an expert witness has testified falsely, or was mistaken with respect to any material fact or opinion. The reasons or opinions of an expert are not conclusive upon a jury; but the jury should not arbitrarily or lightly reject the testimony of an expert, nor should the jury accept it just because the witness is an expert." (Italics ours.)

Jurisdiction

The jurisdiction of this Court is invoked under Sections 1257 (3) and 2101 (c), Title 28 U. S. Code and Rule 38-1/2 of this Court.

We are confident of our ability to demonstrate that jurisdiction is totally lacking; that petitioner's confessions to Captain Meenahan, Herrschaft and the district attorney were lawfully obtained under both state and federal law; that in the matter of procedure the issue as to the legality of such confessions was properly submitted to the jury and

that, therefore, in this respect there was no denial of due process. The contention that the three subsequent confessions "were so close in point of time and circumstances to the first, that they should have been ruled out, for the same reasons which vitiated the first confession and made it inadmissible" is, we shall show, without basis in fact or law. We are further certain that no error was committed by the trial court in permitting the jury to receive the testimony of the petitioner on his first trial, despite the fact that he did not take the witness stand during the second trial.

We do not argue petitioner's fourth contention that *sans* all the later confessions "the state has failed to make out a case." This is, we submit, but a straw man set up to be knocked down. The trial court submitted the case to the jury on this point in this language:

> "Gentlemen, if all of the confessions are rejected by the jury, the defendant must be acquitted, for the reason that the court rules as a matter of law that all of the other evidence in the case offered by prosecution, even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty."

It is our submission that none of the decisions of this Court dealing with due process condemns the trial-procedure here presented and that, therefore, the petition is wholly devoid of merit.

ARGUMENT

I.

Petitioner's first and third points are so closely related that they may be met by one answer. The claim is that the invalidity of the Helfand confession, legally determined to exist by reason of mental coercion and promise of immunity, so permeates and taints the subsequent confessions to Meenahan, Herrschaft and the district attorney, that the latter group were themselves inadmissible to a point where their reception in evidence constitutes a denial of due process under the Fourteenth Amendment. The elements relied upon to establish the continuity of the original invalidity are (1) the closeness in point of time between the making of the Helfand confession and of the later group, and (2) the consequent "carry-over" phenomenon.

Partial support for this position—to the extent that it is based on the element of promise of immunity—is found in the dissenting opinion of Fuld, *J.*, in the Court of Appeals that:

> "The trial judge charged unequivocally that Dr. Helfand had promised defendant, 'in order to induce him to confess,' that he would not be prosecuted for murder in the first degree, that such promise was authorized by the district attorney and that defendant confessed in reliance upon it. Consequently, as the trial court went on to charge, that confession was inadmissible as a matter of law. (See Code Crim. Proc. §395.) In view of that charge—which, of course, became the law of the case—it necessarily follows, as a matter of ineluctable logic, that any and all other confessions to the district attorney or those associated with him in the investigation and

> prosecution of this very homicide, must also be deemed to have been induced by that promise, and likewise inadmissible. Accordingly, when the court further instructed the jury that it might find that the confessions to assistants of the district attorney and to a police captain—made within an hour or two after immunity had been promised—had not been induced by the promise, it pursued a course that was not only opposed to logic, but incompatible with the law of the case. That was error highly prejudicial to defendant."

It is obvious both from this quotation and from Judge Fuld's entire dissenting opinion (in which Loughran, *Ch. J.* concurred) that he finds fault with the submission to the jury of the Meenahan and district attorney confessions only upon this ground. It was the promise of immunity alone which in his opinion was the tainting factor. He considered it legal and proper to permit the jury to pass as a question of fact upon the voluntary nature of these confessions insofar as the element of "mental coercion" was claimed to have invalidated them for all time. The defense contention that the period of time intervening between the Helfand confession and these confessions was so short as to obviate any possibility that the effects of the mental coercion by Helfand had disappeared was, he holds by silence on the subject, not grounded in law.

With great deference to the learned judge, we submit that what he considers "a matter of ineluctable logic" as to the inescapable fact that the Helfand promise of immunity induced the subsequent confessions, is completely contradicted by the combination of the records of the two trials. We concede here, as we conceded in the Court of

Appeals, that if petitioner had admitted the fact of his confessions and had contended that he was induced to make them by the promise of immunity, that promise would have bound the district attorney to prosecute him for manslaughter only. Petitioner's position, however, has always been that actually he consciously made no confession to Meenahan, Herrschaft or the district attorney and, further, that if such confessions existed, they were procured from him during a period of unconsciousness which lasted from early Friday morning, January 13th, until Sunday morning when he regained consciousness.

What is at issue is, not a syllogism, but a state of mind. Our answer, therefore, to Judge Fuld's position is that the key to this question lay, not in "a matter of ineluctable logic", but in the determination of a question of fact: Did petitioner make the subsequent confessions consciously, and uninfluenced by the promise of immunity, or did he make the subsequent confessions under the influence of the promise, or did he, in fact, not *consciously* make the confessions at all? That this was a question of fact, to be resolved by the jury under proper guidance by the trial court, cannot be denied (*People* v. *Leyra, supra; Lee* v. *Mississippi,* 332 U. S. 742; 92 L. Ed. 330). Nor can it be doubted that the instructions to the jury were of the utmost clarity. Dye, *J.*, speaking for the majority of the court, says:

> "According to the record now before us, the Helfand confession was again received in evidence 'merely on the question as to whether or not whatever statements the defendant made * * * were inspired' by Dr. Helfand, an issue raised by defense counsel. This was received after the trial court had cautioned counsel at length, followed by a most

explicit and detailed instruction to the jury as to its illegality phrased in most simple and understandable language that they might not consider it on the issue of guilt under 'any circumstances', but were limited to a consideration of its effect on the later confessions, and that these two were to be entirely disregarded if found to be dependent upon it in any respect whatsoever, a distinction which each individual juror signified that he understood. The Trial Judge did not stop there but dealt with it in his main charge and we believe fully and adequately by pointing out again and again that as a matter of law the confession made to Dr. Helfand was not to be considered on the issue of guilt. Moreover, he was careful to instruct the jury as to the defendant's contention leaving them to say with what force and effect the 'coercion and promise * * * did in fact carry over and into each of the subsequent confessions' at the same time giving like instructions as to the People's contention, leaving it for the jury to say whether the later confessions made to other persons 'were entirely voluntary and not induced by any promise of leniency.'

"In this manner and by this means the defendant's statement to Dr. Helfand was effectively insulated from the jury for consideration on the issue of guilt and was made available to them for the sole and limited purpose of saying whether or not the later statements made to others were dependent in any way on coercion or inducement, coupled with the clear and positive instruction that if so found to be, it was 'worthless as evidence'. Such submission for separate consideration was in obedience to our specific ruling at the prior trial.

"When the Trial Judge charged that as a matter of law a promise of leniency had been made by Dr.

> Helfand, he did not thereby make that statement 'the law of the case' to such an extent as to deprive the jury of the benefit of his instruction as to 'carry over and inducement'. That was the precise issue they were required to pass upon. The 'law of the case' governing the jurors in their deliberations is to be found in the charge in its entirety and is not to be taken from a ruling concerning the limited nature and effect of a single item of evidence, particularly, when the point said to be prejudicial, as here, has been specifically excluded. The law governing the retrial of this case was explicitly laid down by us at the prior trial which was that the statement to Dr. Helfand was coerced and worthless as evidence. The circumstance that the Trial Judge also said it was worthless, because a promise had been made as a matter of law, did not in any way prejudice the defendant. It was, if anything, to his advantage."

This Court has, under somewhat similar facts, felt itself to be bound by a jury's verdict of guilt and the affirmance thereof by the highest court of a state. In *Lisenba* v. *California* (314 U. S. 219), it is written:

> "The petitioner has said that the interrogation would never have drawn an admission from him had his confederate not made a statement; * * *. He exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer."

It is, moreover, of importance in the consideration of this petition that the Court be acquainted with the distinc-

tion made by Judge Fuld between the Meenahan and district attorney confessions, and that made to Herrschaft. The learned Judge says:

> "Nor does the existence of the confession that defendant made to Herrschaft, his friend and business associate, change the situation or permit an affirmance. True, that confession may stand in a category different from those made to prosecutor and police; *other considerations, considerations separate and apart from the district attorney's promise, may have prompted defendant to confess to his friend.* I am willing to assume, therefore, that the court was warranted in leaving to the jury the question whether or not the promise induced defendant's confession to Herrschaft, but that does not dispose of the matter. Since the jury also had before it the two confessions made to the law enforcement officials, and since those confessions played a not unimportant part at the trial, no court can say that the jury, in reaching its verdict, either relied solely upon the confession to Herrschaft or disregarded entirely the other confessions." (Italics ours.)

We have, we submit, thus demonstrated that of the six Judges who in the Court of Appeals participated in the second decision of the case, five, including the dissenting Chief Judge and Fuld, *J.*, either directly or by failing to write any dissent from the majority, held it to have been proper for the Trial Court, *on the issue of coercion* to submit to the jury as a question of fact the voluntariness of the confessions to Meenahan, Herrschaft and the district attorney (Froessel, *J.* concurred in the affirmance under the provisions of Code Crim. Proc. Sec. 542). That deci-

sion, therefore, established that on the question of mental coercion the subsequent confessions were valid under the provisions both of New York State Constitution, Article 1, Section 6:

> "No person shall be deprived of life, liberty or property without due process of law."

and Code Criminal Procedure, Section 395:

> "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

If, therefore, as we are certain is the case, there is no legal basis for the distinction between "mental coercion" and promise of immunity as made by the dissenting minority of the Court of Appeals then the curative submission of these questions of fact to the jury should control in the second as in the first element.

Petitioner here contends that nevertheless the reception in evidence of these subsequent confessions constitutes a violation of his rights under the due process clause of the 14th Amendment of the Federal Constitution because

(1) The Helfand confession was obtained by means of mental coercion, etc., and promise of immunity, and

(2) The subsequent confessions "were so close in point of time and circumstances" to the Helfand confession that these should not have been received for the same rea-

sons "which vitiated the first confession and made it inadmissible".

In support of this contention, petitioner cites twenty-four cases decided by this Court. It is our submission that none of these cases supports his contention. They fall into four classes:

(1) Affirmance by this Court of convictions in state courts with opinions from which petitioner has taken language stating general principles. Some of these cases even involve facts closely similar to the instant case (*Adamson* v. *California*, 332 U. S. 46, 191 L. ed. 1903; *Gallegos* v. *Nebraska*, 342 U. S. 55, 96 L. ed. 86; *Lisenba* v. *California*, 314 U. S. 219, 86 L. ed. 166; *Lyons* v. *Oklahoma*, 322 U. S. 596, 88 L. ed. 1481; *Stroble* v. *California*, 343 U. S. 181, 96 L. ed. 872, rehearing denied 343 U. S. 951, 96 L. ed. 1353).

(2) Reversals by this Court of convictions in state courts, but involving cases where only one involuntary confession was the basis of a conviction or where, although later confessions were held to have been legally obtained, an earlier and invalid confession was also permitted to be considered by the jury (*Malinski* v. *New York*, 324 U. S. 401, 89 L. ed. 1029; *Brown* v. *Mississippi*, 297 U. S. 278, 80 L. ed. 682; *Chambers* v. *Florida*, 309 U. S. 228, 84 L. ed. 716; *Canty* v. *Alabama*, 309 U. S. 628, 84 L. ed. 988; *Haley* v. *Ohio*, 332 U. S. 596, 92 L. ed. 224; *Harris* v. *South Carolina*, 338 U. S. 68, 93 L. ed. 1815; *Lomax* v. *Texas*, 313 U. S. 544, 85 L. ed. 1511; *Turner* v. *Pennsylvania*, 338 U. S. 62, 93 L. ed. 1810; *Vernon* v. *Alabama*, 313 U. S. 547, 85 L. ed. 1513; *Ward* v. *Texas*, 316 U. S. 546, 86 L. ed. 1663; *Watts* v. *Indiana*, 338 U. S. 49, 93 L. ed. 1801; *White* v. *Texas*, 310 U. S. 530, 84 L. ed. 1343).

(3) Cases involving prosecution in federal courts and thus governed by Article V. of the Constitution and not germane to a case emanating from a state court (*Bramn* v. *United States,* 168 U. S. 569, 42 L. ed. 530; *McNabb* v. *United States,* 318 U. S. 332, 87 L. ed. 819; *United States* v. *Carnigan,* 342 U. S. 36, 96 L. ed. 48);

(4) Cases not involving oral confessions but sundry other constitutional or statutory rights, as exclusion of Negroes from grand jury membership (*Pierre* v. *Louisiana,* 306 U. S. 354, 36 L. ed. 757) or forcible use of an emetic (*Rochin* v. *California,* 342 U. S. 165, 96 L. ed. 183).

We think it obvious that the first class of cases needs no discussion here. Even in the cases cited under the second class, this Court has left room for the use by the state of subsequent confessions where the proof adequately showed that the effect of the original coercion had evaporated and was not the inducing cause of later confessions. Thus, in *Malinski* v. *New York, supra,* the first of a series of confessions was held to be coercive and involuntary and, therefore, illegal and inadmissible. This Court reversed an affirmance of the conviction by the Court of Appeals despite the existence of subsequent confessions suffering from none of these disabilities. The reason for the reversal, insofar as it was due to the relation between the first and the later confession, is stated by Douglas, *J.* (p. 410):

> "The jury at no time was admonished that it could not convict on the basis of the first confession, nor consider it as evidence against Malinski."

The similarity between *Malinski and the instant case upon its first trial* was pointed out by Froessel, *J.* (302 N. Y. 353, 364):

> "We recognize that due process is not lacking where upon facts permitting different conclusions, it is left for the jury, under a proper submission, to say whether there was coercion (Malinski v. New York, supra; Lisenba v. California, supra; Lyons v. Oklahoma, 322 U. S. 596), * * *."

Petitioner's citation of *McNabb* v. *United States, supra,* as an example of the third class of cases involving federal court prosecutions, is of no assistance to this Court; nor can aid be found in the cases comprising the fourth class.

We place our reliance for the legality of petitioner's conviction on the cases of *Lisenba* v. *California, supra, Lyons* v. *Oklahoma, supra,* and *Stroble* v. *California, supra.*

In *Lisenba,* the appellant was arrested on the Sunday morning of April 19th. Although he was brought to the district attorney's office and stayed there for several hours, he was not questioned. Thereafter he was questioned for about an hour concerning an incest charge not involved in the murder. In the later afternoon, he was fed at a cafe and during the night "various officers questioned him in relays". He remained fully dressed and without sleep, sitting in a chair. Monday morning he was given breakfast and then the questioning was resumed and continued until about three o'clock Tuesday morning. Appellant said that he fainted. Others described it as sleep. After he had breakfasted, he was placed under arrest, arraigned before a magistrate and committed on the incest charge. Appellant testified on his murder trial that during the

questioning from Monday evening until Tuesday morning, he was badly beaten. There was both corroboration and denial of this testimony. The state, however, did not deny that he "was repeatedly and persistently questioned at intervals during the period from Sunday night until Tuesday morning". During this period of April 19-21, he "made no incriminating admission or confession".

On May 1st, appellant's accomplice was arrested and made a statement. On May 2nd, appellant was confronted with the accomplice but refused to make any statement. Later in that day, he was questioned by the district attorney until supper time and then, after he received some food, until later in the night. Appellant made no incriminating answers. The state's testimony showed that about midnight when appellant was alone with a deputy sheriff, he turned to the officer and "said something to the effect: 'Why can't we go out and get something to eat; if we do, I'll tell you the story.' " Appellant was taken to a public cafe and fed, and then confessed. He later repudiated the confession with the claim that it was merely an attempt on his part to retell the tale which the accomplice had told and "which had been constantly dinned into his ears". There were, however, discrepancies in the two stories.

A preliminary *voir dire* was held at the trial and the trial court admitted the confession in accordance with California law (identical with that of New York). The trial court also charged the jury "that the confessions must be utterly disregarded unless they were voluntary, that is, not the result of inducement, promises, threats, violence, or any form of coercion."

This Court found that there had been an illegal and criminal violation of the California statute requiring

prompt arraignment. Denial of opportunity to consult counsel was also determined to have existed. The Court also commented on the lack of authority in the taking of appellant from jail to the district attorney's office for questioning. Nevertheless, the Court limited the issue to the voluntary or involuntary character of the confessions elicited from appellant, these other circumstances being only items to be appraised "in determining whether the use of the confession was a denial of due process". In sustaining the conviction, the Court wrote:

> "There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury which involves an answer to the due process question. In such a case we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.
>
> "Here judge and jury passed on the question whether the petitioner's confession were freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not eo nomine one concerning due process. Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty then is to determine whether the evidence requires that we set aside the finding of two courts and a jury and adjudge the admission

of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty as to amount to a taking of life without due process of law.

"In view of the conflicting testimony, we are unable to say that the finding below was erroneous so far as concerns the petitioner's claim of physical violence, threats or implied promises of leniency. There remains the uncontradicted fact that on two occasions, separated by an interval of eleven days, the petitioner was questioned for protracted periods. He made no admission implicating him in his wife's death during, or soon after, the interrogations of April 19, 20 and 21. If, without more, eleven days later confessions had been forthcoming we should have no hesitation in overruling his contention respecting the admission of his confessions.

"Does the questioning on May 2nd, in and of itself, or in the light of his earlier experience, render the use of the confessions a violation of due process? *If we are so to hold it must be upon the ground that such a practice, irrespective of the result upon the petitioner, so tainted his statements that, without considering other facts disclosed by the evidence, and without giving weight to accredited findings below that his statements were free and voluntary, as a matter of law, they were inadmissible in his trial. This would be to impose upon the state courts a stricter rule than we have enforced in federal trials.* There is less reason for such a holding when we reflect that we are dealing with the system of criminal administration of California, a quasi-sovereign; that if federal power is invoked to set aside what California regards as a fair trial it must be plain that a federal right has been invaded." (Italics ours.)

Stronger even than *Lisenba* in support of the instant judgment is *Lyons* v. *Oklahoma, supra.* The parallelism in fact of the two cases is set by Mr. Justice Reed's statement:

> "This writ brings to this Court for review a conviction obtained with the aid of a confession which furnished, if voluntary, material evidence to support the conviction. As the questioned confession followed a previous confession which was given on the same day and which was admittedly involuntary, the issue is the voluntary character of the second confession under the circumstances which existed at the time and place of its signature and, *particularly, because of the alleged continued influence of the unlawful inducements which vitiated the prior confession.*" (Italics ours.)

In *Lyons,* petitioner was interrogated for about two hours immediately after his arrest. Eleven days later he was questioned in the prosecutor's office from about six thirty in the afternoon until between two and four o'clock in the morning, when a confession was forthcoming. Later that day, a second confession, procured at the state penitentiary, was made. Two days later a third confession to a penitentiary guard came forth. Petitioner had no counsel until after all confessions had been given. There was testimony in his behalf—denied by the officers—of physical abuse prior to his first interrogation, as well as evidence of threats of further harm unless he confessed. The evidence of abuse with respect to the second and third confessions was denied by those alleged to have inflicted it. In addition, petitioner was admittedly subjected to a view of a pan of the victim's bones which was placed in his lap

prior to the first confession. Of this episode,* the Court said:

> "As the confession obtained at this time was not offered in evidence, the only bearing these events have here is their tendency to show that the later confession at McAlester was involuntary."

The second confession—that is, the one first given at the penitentiary—was objected to on the ground that "force was practiced to secure it and that even if no force was then practiced, the fear instilled by prisoner's former treatment at Hugo on his first and second interrogations continued sufficiently coercive in its effect to require the rejection of the second confession".

A preliminary *voir dire* was properly held and after the admission of the confession under instructions favorable to the defendant that such confessions should be "carefully scrutinized and received with great caution", the ultimate question of defendant's guilt was submitted to the jury. Conviction resulted. This Court sustained the judgment and in so doing announced several principles which, we submit, conclusively determine the validity of the judgment now under review:

> (1) Neither common law nor constitutional due process prohibit the questioning of a suspect while in custody of police officers;
>
> (2) It is a matter for state courts to determine the wording of instructions upon the involuntary character of a confession and if such instructions fairly raise the question, the requirements of due process are satisfied;

---

* Which we relate to the Helfand contact.

(3) While this Court is under the duty of examining into the evidence as to the voluntary or involuntary nature of the confession "no formula to determine this question by its application to the facts of a given case can be devised".

(4) Where an improperly obtained confession is not used at a trial but one later made is, then:

"The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practice which may fairly be drawn from the surrounding circumstances."

(5) In amplification of this last mentioned principle, the Court wrote:

"The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at the trial of his subsequent confessions under all possible circumstances. The admissibility of the later confession depends upon the same test—is it voluntary. Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of the earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. *If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain suituation, that the confession should be admitted as voluntary, cannot be a denial of due process.*" (Italics ours.)

The argument now made by the instant petitioner as to closeness of time and carry-over was also made in *Lyons*. This Court thus answered:

> "Petitioner suggests a presumption that earlier abuses render subsequent confessions involuntary unless there is clear and definite evidence to overcome the presumption. We need not analyze this contention further than to say that in this case there is evidence* for the state which, if believed, would make it abundantly clear that the events at Hugo did not bring about the confession at McAlester."

We turn now to *Stroble* v. *California, supra,* as authority of the most cogent kind for the affirmance of the instant judgment. The principle of decision is identical with that of *Lyons* v. *Oklahoma, supra.* What makes it completely applicable to the instant case is the time factor.

About noon of November 17, 1949, Stroble was arrested for the murder of a six year old girl who had been most brutally killed in connection with a sexual abuse. The arresting officer kicked the defendant and also threatened him with the use of his blackjack. When a nearby civilian asked defendant if he was guilty, he "mumbled something under his breath that sounded like 'I guess I am' ", whereupon he was again slapped and his eye-glasses knocked off.

---

* The confession to Herrschaft furnishes such evidence. If the confession to Captain Meenahan had been coerced and involuntary, petitioner would have availed himself of this opportunity to complain of it to his friend. The strikingly contrary act of, instead, confessing permits us to say with the Court of Appeals (*People* v. *Borowsky*, 258 N. Y. 371); "a jury might reasonably find that he yielded not to fear of violence, but to a conviction that denial of guilt was hopeless when his confederates had turned against him."

On the way to the district attorney's office, defendant admitted the killing in more definite and descriptive terms. To this confession there was no objection at the trial. There was, however, objection to a confession made by defendant to the district attorney about one hour after his arrest and the violence used upon him at that time. The district attorney's interrogation lasted about two hours and during this period defendant had no counsel.

This Court held that the charge of the trial court with respect to confession was proper. We submit that it was not in the least degree different from that of the trial court in the case under consideration. We feel also that the record in *Leyra* is in the important point of "carry over" of coercive effect identical with the record in *Stroble*. The contention is certainly the same:

> "Petitioner does not so much as suggest that the action of any officer during the taking of the confession was accompanied by force or threats. His sole contention is that the incidents in the park foreman's office, coupled with the presence of nineteen officers in the district attorney's office, rendered the confession which he made in the latter office involuntary."

This Court disposed of that contention unfavorably to the petitioner by saying:

> "This Court has frequently stated that, when faced with the question whether there has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession, it must make an independent determination on the undisputed facts. Malinski v. New York, supra (324 U. S. at 494, 89 L. ed. 1032, 65 S. Ct. 781) and cases cited; id., at 438, 89 L. ed. 1050 (dissenting

opinion). We adhere to that rule. In the present case, however, we need not confine ourselves to the undisputed facts; for, even if we give petitioner the benefit of every doubt as to the alleged coercion, we do not think it can fairly be said that his confession in the District Attorney's office was coercion's product. *Whatever occurred in the park foreman's office occurred at least an hour before he began his confession in the District Attorney's office, and was not accompanied by any demand that petitioner implicate himself. Likewise his statement to the officer while on the way to the District Attorney's office was admittedly voluntary.** In the District Attorney's office, petitioner answered questions readily; there was none of the 'pressure of unrelenting interrogation' which this Court condemned in Watts v. Indiana, 338 U. S. 49, 54, 93 L. ed. 1801, 1806, 69 S. Ct. 1347, 1357 (1949). Indeed, the record shows that from the time of his arrest until the time of his trial, petitioner was anxious to confess to anybody who would listen—and as much so after he had consulted with counsel as before. His willingness to confess to the doctors who examined him, after he had been arraigned and counsel had been appointed, and in circumstances free of coercion, suggests strongly that petitioner had concluded, quite independently of any duress by the police, 'that it was wise to make a clean breast of his guilt.' See Lyons v. Oklahoma, supra (322 U. S. at 604, 88 L. ed. 1487, 64 S. Ct. 1208). In the light of all these circumstances, we are unable to say that petitioner's confession in the District Attorney's office was the result of coercion, either physical or psychological." (Italics ours.)

---

* Cf. Confession to Herrschaft and distinction made by Fuld, *J.* between this confession and the Meenahan and District Attorney confessions.

We note in passing that although petitioner does not make a separate point of the claim itself, nevertheless in the body of his petition it is argued that the trial court in *Leyra* did not instruct the jury that the failure to arraign him, as required by the New York statutes, constituted a crime under the provisions of Penal Law, Section 1841. It is conceded that the trial court did charge the jury that such delay of arraignment was illegal. In its charge, the trial court dealt with the effect of delay in arraignment thus:

> "What is the effect of this delay? I charge you that even though illegal, the delay does not in and of itself, as a matter of law, render any confession subsequently made invalid. *Such delay must be considered by you, however, upon, and only upon the question of the voluntary nature of a confession; that is, whether the neglect to properly arraign him affected the voluntariness of the confession. That is submitted as a question of fact for you to determine. If you find that his confession was thereby affected, the confession will be disregarded. On the other hand, if you find the confession was not thereby affected, you will disregard the fact that there was an unnecessary, and, therefore, illegal delay in arraigning the defendant before a Magistrate.*" (Italics ours.)

In *Stroble* v. *California*, when this Court was asked to reverse the conviction on the further ground of illegal delay in arraignment it answered:

> "Although the California Supreme Court found that the failure promptly to arraign petitioner before a committing magistrate was a violation of state law, that is not determinative of the issue before us. When this Court is asked to reverse a state

court conviction as wanting in due process, illegal acts of the state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial, either through the use of a coerced confession or otherwise. Lisenba v. California, supra (314 U. S. at 234, 235, 240, 86 L. Ed. 179, 182, 62 S. Ct. 280); Lyons v. Oklahoma, supra (322 U. S. at 597, note 2, 88 L. ed. 1483, 64 S. Ct. 1208); Gallegos v. Nebraska, 342 U. S. 55, 59, 65, ante. 86, 91, 94, 72 S. Ct. 141 (1951). Upon the facts of this case, we cannot hold that the illegal conduct of the law enforcement officers in not taking petitioner promptly before a committing magistrate, coerced the confession which he made in the District Attorney's office or in any other way deprived him of a fair and impartial trial."

There remains for consideration petitioner's claim of impropriety under Article V. of the Constitution in that the trial court permitted the prosecutor to read to the jury a portion of petitioner's testimony on the first trial, although he did not take the stand at the second trial. That testimony was his description of the effects of Doctor Helfand's physical manipulations of his body and alleged control of his mind: "I drifted off so I lost consciousness. From that time on I didn't remember anything until Sunday."

This contention, now clothed in the garb of a constitutional right, was termed before the Court of Appeals a violation of Code Crim. Proc. §464 in that it failed to heed the direction of that statute that upon a re-trial "all testimony must be produced anew". It was then also urged that the procedure was a violation of both the state and federal constitutions in that the petitioner was compelled to testify against himself.

The contention is shown to be in error by an examination of the purpose for, and the circumstances under which, the former testimony was introduced. Since the trial court had, in obedience to the direction of the Court of Appeals, told the jury more than once during the progress of the trial that the Helfand incident constituted mental coercion (and was subsequently to charge the jury to the same effect), it became the law of the case, known to the district attorney as well as to appellant's counsel, that the influence of Doctor Helfand's coercive and illegal methods would be presumed to carry over, affect and taint the subsequent confessions (*People* v. *Sweetin,* 325 Ill. 245, 2 Wharton Crim. Ev. 11th Ed., Sec. 601; *Stroble* v. *California, supra*). It is also known to the district attorney that this presumption placed upon him the burden of proving beyond a reasonable doubt that " * * * the influence which induced the original confession had been removed and the party confessing was no longer dominated by such influence" (*People* v. *Sweetin, supra*).

Appellant's testimony at the first trial met this test and furnished the necessary prophylactic evidence. Unless Doctor Bellinger's incredible diagnosis could be accepted as psychiatric verity as a matter of law (and it was rejected by the jury as a question of fact), a person who has "drifted off so I lost consciousness" cannot be, and remain, under the influence of an antecedent mental compulsion. As we have said, the jury within whose province of determination this question lay, found it incredible (*People* v. *Sherwood,* 271 N. Y. 427, 429; *People* v. *Egnor,* 175 N. Y. 419, 424). The Court of Appeals by its affirmance in this case has similarly so determined.

There are, therefore, three answers to petitioner's contention: First, the constitutional prohibition against self-incrimination relates only to testimonial compulsion. It has been so written by Cardozo, *J.*, while a member of the New York Court of Appeals. In *People* v. *Defore* (242 N. Y. 13), he wrote in construing the privilege granted by the New York Constitution, Article 1, Section 6:

> "We limited it to cases where incriminatory disclosure had been extorted by the constraint of legal process directed against a witness. The Supreme Court agreed with us (*Adams* v. *New York,* 192 U. S. 585, 597, 598). Other courts e.g. *State* v. *Flynn,* 35 N. H. 64; *Comm.* v. *Wilkins, supra*) and learned commentaries (4 Wig. Ed. Secs. 2263, 2264) have taken the same ground. Unless that ruling is to be changed, the conclusion is not doubtful."

In refusing to change the ruling, Judge Cardozo quoted with approval from *Hayward* v. *United States* (268 Fed. 795, 802):

> " 'Witness' is the key word",

and then went on to say:

> "The key word is disregarded, however, when compulsion not testimonial is brought within the orbit of the privilege."

Second, the attempt to invoke the Fifth Amendment of the Federal Constitution must fail. In *Adamson* v. *California* (332 U. S. 46, 191 L. Ed. 1903), a state statute was attacked on the ground that it permitted the prosecution and the court to comment upon the failure of a defendant to explain or deny the evidence against him, and further permitted the court and jury to consider that fact in deter-

mining guilt or innocence. This was contended to be a violation of the protection against self-incrimination accorded by the Fifth Amendment and available by reason of national citizenship to a defendant under the protection of the Fourteenth Amendment. The claim was rejected by this Court:

> "We shall assume, but without any intention thereby of ruling upon the issue, that permission by law to the court, counsel and jury to comment upon and consider the failure of defendant 'to explain or to deny by his testimony any evidence or facts in the case against him' would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law. Such an assumption does not determine appellant's rights under the Fourteenth Amendment. It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights." *

---

* We will not burden this Court with further quotations from its own decisions. Suffice it to say that in *Adamson* v. *California*, p. 52, there is found a history of the doctrine summarized in the above quotation, citing all of the cases in this Court and concluding: "We reaffirm the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship." The last word on the subject has been written by this Court in *Brock* v. *North Carolina*, 97 L. Ed. (advance, p.).

If more were necessary on this subject, it would be sufficient to cite *United States* v. *Heller* (57 Fed. 2nd 627; cert. denied 286 U. S. 567) in which it was said:

> "Having voluntarily become a witness upon one issue in the case, what he there testified may thereafter be shown against him upon any trial of any other issue therein. This was held in principle, but upon somewhat different facts, in *Raffele* v. *U. S.*, 271 U. S. 494, 46 S. Ct. 566, 70 L. ed. 1054 and *Powers* v. *U. S.*, 223 U. S. 303, 32 S. Ct. 281, 56 L. ed. 448; and upon like facts in *Vaught* v. *U. S.*, 7 F. (2d) 370 (CCA 9), and U. S. v. Lindsly, 7 F. (2d) 247 (DCLA). We find in this no invasion of appellant's constitutional immunity against compulsory self-incrimination." *

We conclude with a reference to certain exhibits labeled in the petition appendices "E" and "F" which are quotations from articles on hypnotism by scientists and a quotation from an alleged story of mental coercion in Soviet Russia. It is submitted that such material finds no proper place in the petition to this Court. It was not before the

---

* The current of authority in this country is the same where he testified at the second trial (*Warde* v. *United States*, 158 Fed. 2d 651; *Indian Fred* v. *State*, 36 Arizona, 48; *People* v. *Boyd*, 67 Calif. Appeals 292; *State* v. *Duffy*, 57 Conn. 525; *Cadys* v. *State*, 198 Ga. 99; *Miller* v. *People*, 216 Ill. 309; *State* v. *Rogers*, 56 Kan. 362; *Bess* v. *Com.*, 118 Ky. 858; *Henze* v. *State*, 154 Md. 332; *Com.* v. *Reynolds*, 122 Mass. 454; *State* v. *Newman*, 127 Minn. 445; *Mackmasters* v. *State*, 83 Miss. 1; *State* v. *Speyer*, 207 Mo. 540; *State* v. *Wright*, 38 N. M. 427; *State* v. *Farrell*, 223 NC 804; *Com.* v. *Brown*, 66 Pa. Super. 519; *Rafferty* v. *State*, 91 Tenn. 655; *Rodriguez* v. *State*, 130 Tex. Crim. 438; *State* v. *Tellay*, 100 Utah 25; *Fertig* v. *State*, 100 Wis. 301). It is equally the law where the defendant does not take the stand at the second trial (*Heller* v. *United States*, 57 F. 2d 627; *State* v. *Kimes*, 152 Iowa 240; *State* v. *King*, 102 Kan. 155; *State* v. *McPherson*, 77 Or. 151; *Scherpig* v. *State*, 112 Tex. Crim. 61).

jury in the court below and indeed under the law could not have been submitted to them (*People* v. *Feldman*, 299 N. Y. 153, 168). What counsel could not have done on the trial they should not now be permitted to do. We are confident that this Court will give no consideration to these unauthorized exhibits.

IN CONCLUSION

We respectfully submit:

Petitioner was accorded a fair trial. The three confessions to Captain Meenahan, Herrschaft and the district attorney were freely and voluntarily made without influence in the making thereof by carry-over of the Helfand "mental coercion" or promise of immunity. The issue of voluntary or involuntary confessions was properly submitted to the jury under instructions which met every requirement of law. No error was committed in the reception of evidence either *per ore* or by the reading of petitioner's testimony on the first trial.

II.

The petition should be denied.

Dated, Brooklyn, N. Y., February, 1953.

Respectfully submitted,

MILES F. McDONALD,
District Attorney,
Kings County, New York.

WILLIAM I. SIEGEL,
Assistant District Attorney,
Of Counsel.

(4544)

APPENDIX

Section 395, Code of Criminal Procedure:

"§395. Confession of defendant, when evidence, and its effect

A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

Article 1, Section 6 of the New York State Constitution:

"§6. (Grand jury; protection of certain enumerated rights; waiver of immunity by public officers required.)

* * * * *

No person shall be deprived of life, liberty or property without due process of law."